Attorney Docket No.: FUJI 20.624 (100794-00480)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s):	Hitoshi YAMADA et al.
Confirmation No.:	1140
Serial No.:	10/657,747
Filed:	September 8, 2003
Title:	**RESOURCE LOAD MEASURING METHOD ...**
Examiner:	Kamal B Divecha
Group Art Unit:	2151

December 29, 2008

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

SIR:

Applicants hereby petition for a three-month extension, a petition pursuant to 37 C.F.R. §1.136(a) and authorization to charge the requisite fee being enclosed.

In connection with the Pre-Appeal Brief Request for Review submitted herewith and in response to the final Office Action dated July 2, 2008, Applicants request a panel review to determine whether the Examiner has failed to properly establish bases for a § 101 rejection of claims 7-14 and a § 103 rejection of pending claims 1-20 in the subject application. And, in support thereof, Applicants respectfully submit the following:

R E M A R K S

Claims 1-20 are pending in the application.

Claims 7-14 stand rejected under 35 U.S.C. § 101 for allegedly being directed to non-statutory subject matter.

The Examiner maintained that the bodies of the rejected claims are "directed towards software per se in light of the applicant's specification." Page 8, lines 21-22 of the Office

Action. In support of the rejection, the Examiner cited page 29, lines 26-37 of the specification in contending that "the network control apparatus is a computer program." Page 9, lines 5-6 of the Office Action. But as conceded by the Examiner, the specification clearly describes an exemplary embodiment of a computer program "that causes **a computer to function as the network control apparatus**." Page 9, lines 4-6 of the Office Action. Indeed, the rejected claims recite a network control apparatus with discrete sections.

And even if a claim were merely an apparatus or a computer executing software per se, as contended by the Examiner, the MPEP provides for

> Computer programs are often recited as part of a claim. USPTO personnel should determine whether the computer program is being claimed as part of an otherwise statutory manufacture or machine. In such a case, the claim remains ***statutory*** irrespective of the fact that a computer program is included in the claim. The same result occurs when a computer program is used in a computerized process where the ***computer executes the instructions set forth in the computer program***. Only when the claimed invention taken as a whole is directed to a mere program listing, i.e., to only its description or expression, is it descriptive material per se and hence nonstatutory.
>
> ... When a computer program is claimed in a process where the computer is executing the computer program's instructions, USPTO personnel should treat the claim as a process claim. **When a computer program is recited in conjunction with a physical structure..." MPEP § 2106.01(I). (Emphasis added)

Accordingly, Applicants respectfully submit that the § 101 rejection is improper.

Claims 1-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0073187 to Rawson, III in view of U.S. Patent No. 7,028,083 to Levine et al. Applicants respectfully traverse the rejection.

The Examiner maintained that the description in Rawson, III of "'expected parameters' indicates the presence of expecting or predicting information." Page 12, lines 23-25 of the

Office Action. The Examiner, once again, cited paragraphs [0024]-[0027] of Rawson, III in support for this contention. And again, paragraphs [0024]-[0027] of Rawson, III only describe a judgment that is made to determine whether or not a target apparatus, which is to be managed (hereinafter referred to as a "management target apparatus"), is operating in a normal manner within acceptable parameters. Thus, the "expected parameters" referred to in Rawson, III are merely thresholds or standards for acceptable parameters that reflect normal behavior, as opposed to a server "[behaving] in an unexpected manner." Paragraph [0024] of Rawson, III. Thus, contrary to the Examiner's assertions, the "expected parameters" described in Rawson, III at most disclose a determination of normal ("expected") vs. abnormal ("unexpected") behavior of a network entity, and does not include any disclosure or suggestion of any predictive techniques.

Thus, Rawson, III, as cited and relied upon by the Examiner, does not disclose or suggest, among other things, ***predicting*** load information of resources according to a prediction algorithm, and adjusting the measuring intervals (at which the load information of the resources is measured) based on the measured load information ***and the predicted load information***, as recited in independent claims 1, 7, 11 and 15.

The Examiner relied upon Levine et al. as a combining reference that allegedly suggests using an exponentially weighted average algorithm, that is, a prediction algorithm, to predict load information of resources.

As discussed before in a previous response, however, Rawson, III, as cited and relied upon by the Examiner, merely describe adjusting a period of management by monitoring an operation state over time. Rawson, III explicitly describes the nature of this technique as one of "time decay." Please see the title, abstract, and summary of Rawson, III. Furthermore, the

prediction described in Levine et al. is only directed to download times for correspondingly routing traffic. Thus, the cited references describe wholly separate objectives for their respective disparate features relied upon by the Examiner—namely, Rawson, III only describe threshold "expected parameters" for detecting "unexpected behavior," and thereby adjusting a period of management, whereas Levine et al. describe predicting download times for routing traffic.

In view of the foregoing, Applicants, again, respectfully submit that the Examiner has failed to establish a prima facie case of obviousness in failing to provide any suggestion, motivation, or objective reason—other than improper hindsight from the claimed invention itself—for one skilled in the art to alter and combine the disparate features of the "time decay" technique described in Rawson, III for management period adjustments and the weight average prediction technique described in Levine et al. for traffic routing. Indeed, the Examiner clearly used the claimed invention as a blueprint to piece together the disparate features to meet the claimed invention.

And even assuming, arguendo, that it would have been obvious to one skilled in the art at the time the claimed invention was made to combine Rawson, III and Levine et al., such a combination would have, at most, suggested an "expected parameters"-based period of management adjustment technique, as described in Rawson, III, with downloads being redirected according to weight average predictions of download times, as described in Levine et al. Such a combination would still have failed to disclose or suggest,

> "[a] resource load measuring method for measuring load information of resources within a network, comprising:
> measuring the load information of the resources at measuring intervals and storing the measured load information in a storage section;

predicting the load information of the resources according to a prediction algorithm and storing the predicted load information in the storage section; and

adjusting the measuring intervals based on the ***measured load information and*** the ***predicted load information stored in the storage section***," as recited in claim 1. (Emphasis added)

Accordingly, Applicants respectfully submit that claim 1, together with claims 2-6 dependent therefrom, is patentable over Rawson, III and Levine et al., separately and in combination, for at least the foregoing reasons. Claims 7, 11, and 15 incorporate features that correspond to those of claim 1 cited above, and are, therefore, together with claims 8-10, 12-14, and 16-20 dependent therefrom, respectively, patentable over the cited references for at least the same reasons.

Any fee due with this paper may be charged to Deposit Account No. 50-1290.

Respectfully submitted,

/Dexter T. Chang/
Dexter T. Chang
Reg. No. 44,071

CUSTOMER NUMBER 026304
Docket No.: FUJI 20.624 (100794-00480)
Fax: (212) 940-8986 or 8987
Docket No.: FUJI 20.624 (100794-00480)
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